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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE:) Case No. 17-05276-LT
CESAR MEDINA) Chapter 7
KRYSTAL ANNE MEDINA)
)
)
)
)

KRYSTAL ANNE MEDINA) Adversary No. 19-90065-LT
Plaintiff,)
vs.)
NATIONAL COLLEGIATE STUDENT)
LOAN TRUST 2006-3;)
)
)
)
)

DECLARATION OF PROFESSOR JOHN BROOKS II

1 I, John R. Brooks II, mindful of the penalties of perjury, do declare and state:

- 2 1. I am over the age of 18 years and competent to make this declaration. I make
3 this declaration based on my own personal knowledge and without drawing
4 upon any specialized methods or processes.
- 5 1. I am a full-time, tenured Professor of Law at Georgetown University Law
6 Center, in Washington, D.C. My primary fields of expertise are federal tax
7 law and federal student loan law. I teach courses on federal income tax law,
8 corporate tax law, and tax policy. I have published academic research on
9 both tax law and student loan law in law journals including the *Tax Law*
10 *Review*, the *Georgetown Law Journal*, the *Utah Law Review*, the *Journal of*
11 *Legal Education*, and *Tax Notes*. I have also published op-eds on student
12 loans in the *New York Times* and the *L.A. Times*. I have been quoted by or
13 interviewed for stories related to tax or student loans in outlets such as
14 National Public Radio, *USA Today*, *Politico*, *Inside Higher Ed*, *Newsweek*,
15 *Buzzfeed*, Marketplace, and more. I have consulted on both tax and student
16 loan legislation with Congressional offices and have aided in drafting
17 pending legislation related to student loans.
- 18 2. Prior to teaching, I was a tax attorney for Ropes & Gray LLP and a judicial
19 clerk for Judge Norman H. Stahl on the U.S. Court of Appeals for the First
20 Circuit.
- 21 3. I have been compensated by Plaintiff's counsel for my time spent at my
22 average hourly rate of \$500 but I understand that Plaintiff's counsel has
23 agreed to cover this sum personally and Ms. Medina has not been charged in
24 any way for this opinion.
- 25 4. I have reviewed the documents relied upon by the moving party ("Movant")
26 along with other publicly available records that are too voluminous for
27 convenient examination in Court.

- 1 5. Massachusetts public charities are required to make substantive financial and
2 operational filings with the Attorney General’s Office of Public Charities,
3 *available at:* <http://www.charities.ago.state.ma.us/charities/>.
- 4 6. If one searches for “education resources institute” (without a “the”), it shows
5 all the filings that TERI made through the Office of Public Charities
6 (“OPC”).
- 7 7. Between 2000 and 2013, TERI annual filed with the OPC, *inter alia*, its
8 audited financials, IRS Form 990s, Articles of Incorporation (“AOI”), and
9 bylaws.
- 10 8. In 2001, TERI disclosed that it had entered into a a purchase and sale
11 agreement with the First Marblehead Corporation (“FMC”) whereby:
 - 12 a. TERI sold its assets and transferred the majority of its employees to
13 FMC for \$8.9 million (Ex. 3 at 209);
 - 14 b. FMC placed these assets and persons into a new for-profit subsidiary
15 called the First Marblehead Education Resources (“FEMR”) (Ex. 2 at
16 38);
 - 17 c. FMC and TERI entered into Master Servicing Agreement under
18 which FMER would perform the loan origination, customer service,
19 default prevention, default processing and administrative origination
20 and servicing duties required of TERI under the Loan Origination
21 Agreements (“LOA”) (Ex. 3 at 208-210 and Ex. 2 at 28);
 - 22 d. FMER and TERI thereafter shared a board member (Exhibit 2 at 27,
23 48) and both TERI and FMC described one another as related parties
24 in financial disclosures (Ex. 2 at 48 and Ex. 3 at 226);
 - 25 e. TERI did not, however, report or disclose that FMER was a related
26 organization to the IRS (Exhibit 5 at 321, 341, 370);
- 27 9. In 2003, TERI amended its bylaws, including significant changes from the
28 original 1985 bylaws:

- a. The new bylaws exempted officers and directors from liability for voting on or otherwise engaging in contracts in which they had a personal interest (Exhibit 4 at 276-277);
 - b. TERI checked “no” on line 77 of Form 990 which asked whether during that year “changes made in the organizing or governing documents but not reported to the IRS?” (Exhibit 3 at 341);
 - a. Each year from 2002 through 2012, TERI filed audited financials with the OPC, which disclosed that between 2002 and 2008:
 - b. TERI earned approximately \$147 million for loan origination services under the LOAs (See “Origination Fees” at Exhibit 2 at 36, 56, 78, 100 and 126; also at Ex 5 at 361, 398, 430, 461, 496 and 524);
 - c. TERI paid FMER approximately \$532 million for loan origination processing and other services under the MSA (*id.*);
 - d. In 2008, the balance of student loans outstanding guaranteed by TERI totaled approximately \$16.9 billion, and TERI reserved approximately 2% of that balance, or \$326 million, in cash, cash equivalents, and marketable securities to cover defaults (Exhibit 2 at 145);
 - e. FMC’s officers and directors liquidated equity worth several hundred million dollars; (Exhibit 6), including \$94 million to Ralph James, Vice Chairman and President of FMC, who is the sender of the email introduced by the Movant dated May 9, 2002 asking Lisa McNeely and “Paul McCarty (as agent for TERI)” to confirm the parameters of TERI’s loan origination contract with Bank One (Ex. 9; *see also* Movant’s Evidentiary Objections at 21, ECF No. 37-2);
10. In 2008, TERI sought relief in bankruptcy by filing a petition, which the Movant highlighted identified TERI as a nonprofit and was filed under penalty of perjury (Ex. 8). That petition also states:

- a. TERI at times used the name “Boston Systems Resources Inc”(Ex. 8 at 206), which TERI previously disclosed was a for-profit subsidiary that it absorbed in 2001 (Exhibit 2 at 15);
 - b. TERI at times used the name TERI Marketing Services, Inc (“TMSI”) (Ex. 8 at 206), which was a for-profit subsidiary of FMC (Ex. 3 at 212);
 - c. In TERI’s statement of financial affairs filed two months the initial petition, TERI’s General Counsel Amy Bizar stated that she was unable to “independently verify the accuracy” of TERI’s financials and that TERI had relied on FMC to provide accurate information because “FMC manages many of [TERI’s] contractual relationships with third parties, including its litigation and collection efforts.” (Exhibit 8 at 579);
11. Between 2011 and 2012, TERI finalized its own liquidation, and during those years:
- a. paid its officers and employees \$5.2 and \$6.4 million, which exceeded its annual revenue in both years (Exhibit 2 at 159, 178);
 - b. In connection with the sale of its remaining assets to the Massachusetts Higher Education Assistance Corporation, TERI disclosed that,
 - a. “except as set forth on Schedule 2.9(c) of the Disclosure Schedules, there is no dispute or Claim concerning any Tax Liability of TERI either (i) claimed or raised by any Governmental Entity in writing or (ii) as to which the directors and officers (and employees responsible for Tax matters) of TERI have actual Knowledge” (Ex. 7 at 550);
 - b. “except as set forth in Schedule 2.8 of the Disclosure Schedules, there is no investigation by any Governmental

Entity with respect to TERI pending or, to the Knowledge of TERI, threatened” (Ex. 7 at 549-50);

c. “TERI has been exempt from federal income taxation pursuant to Section 501(c)(3) of the Code at all times during its existence. Except as set forth on Schedule 2.9(d) of the Disclosure Schedules, no circumstances exist, to the Knowledge of TERI, and no transaction or activity is presently contemplated or under consideration, that is reasonably likely to cause such Tax exemption to be revoked” (*id.*);

a. TERI’s auditors could not verify that TERI was in compliance with federal grant programs under the OMB standards (Exhibit 2 at 176).

TERI’s Corporate Character

12. Before the IRS will grant an applicant’s tax exemption, an applicant must file IRS Form 1023, the Application for Recognition of Exemption Under Section 501(c)(3), which asks, in addition to basic financial and operational information, about an organization’s mission or purpose, its policies on conflicts of interest and private benefit transactions, and its relationships with for-profit entities.

13. Form 990 requires organizations to alert the IRS to any activities that might raise questions about its exempt status and whether it continues to serve public, rather than private, interests.

14. While the standards for exemption are the same for both new and existing organizations, revocations of exempt status are rare due to the difficulties of practical enforcement and the availability of so-called “intermediate” sanctions for violations.

15. I understand that the Movant has concluded that “there is utterly no evidence that TERI was at any time a for profit corporation.”

1 16. I do not believe this is a responsible conclusion to draw from the current
2 record, which contains a number of troubling inconsistencies, irregularities,
3 and contradictions regarding TERI's activities between 2001 and 2012.

4 17. However, it would be equally premature to conclude at this stage that TERI
5 was not operating within the scope of its charitable and tax-exempt mission.

6 18. Rather than engage in speculation or hypotheticals, I would recommend that
7 at a minimum, the following must be addressed:

8 (i) whether the \$8.9 million FMER paid for TERI's assets and employees
9 was at or near fair-market value and how that purchase price compares with
10 similar transactions in the industry at that time;

11 (ii) whether TERI maintained sufficient control over the loan programs
12 under the terms of the Master Servicing Agreement and why TERI paid
13 FMER \$531 million for subcontracting work it was only paid \$141 to
14 perform;

15 (iii) whether TERI ever disclosed its relationship with FMER and the
16 changes made to its governing documents to the IRS, and records evidencing
17 the allegations, scope, and outcome of the regulatory investigations
18 disclosed by TERI on the Disclosure Schedules in Exhibit 7;.

19 19. If and/or when the Movant produces these records, I would then be in a
20 position to offer a formal opinion on TERI's corporate character and
21 whether it was being operated for private benefit based upon my specialized
22 training and expertise.

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Signature:

A handwritten signature in black ink, appearing to read "John Brooks", written over a horizontal line.

Email: john.brooks@law.georgetown.edu